



January 14, 2020

VIA CM/ECF

Hon. Sarah L. Cave, U.S.M.J.
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, MDL No. 2542,
Opposition Letter Brief Regarding Motion to Compel Discovery of Jim Rogers

Dear Judge Cave:

I write on behalf of Plaintiff JBR in opposition to Keurig's request to re-depose Jim Rogers. The two-day deposition of JBR's now co-CEO Jim Rogers occurred on February 12-13, 2019. Keurig requests a second deposition due to JBR's production of documents from its prior malpractice action against its former advertising attorney Tsan Abrahamson of Cobalt Law ("Cobalt Arbitration") after the first deposition of Jim Rogers. The timing of both Jim Rogers' first deposition and the document production at issue, however, was a consequence of Keurig's own delay in propounding pertinent discovery requests. Keurig's request should be denied as cumulative, unduly burdensome, irrelevant, and contrary to the parties' past stipulations.

The factors relevant to the Court's exercise of discretion to allow or preclude a second deposition under Rule 26(b)(2) include "whether the second deposition of the witness would be unnecessarily cumulative, whether the party requesting the deposition has had other opportunities to obtain the same information, and whether the burden of a second deposition outweighs its potential benefit." *See Ganci v. U.S. Limousine Service, Ltd.*, 2011 WL 4407461 (S.D.N.Y. Sep. 21, 2011), citing *Fresnius Med. Care Holdings, Inc. v. Roxane Laboratories, Inc.*, No. 2:05-cv-0889, 2007 WL 764302, at *2 (S.D. Ohio March 9, 2007); *Collins v. Int'l Dairy Queen*, 189 F.R.D. 496 (M.D. Ga.1999); *Keck v. Union Bank of Switzerland*, No. 94 Civ. 4912, 1997 WL 411931, at *3 (S.D.N.Y. July 22, 1997); *Hurley v. JARC Builders, Inc.*, 164 F.R.D. 39 (E.D. Pa.1995). Also relevant to a request for a second deposition of a witness is the timing of the first deposition and any pertinent requests for production of documents, and particularly whether the first deposition took place before JBR had completed production of documents. *Eaton Corp. v. Weeks*, 2014 WL 700466, at *3 (E.D. Mich. Feb. 24, 2014) (it is within the Court's discretion to deny a second deposition even if "relevant documents are produced subsequent to the [first] deposition if the party taking the deposition either failed to request those documents in timely fashion or chose to

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conduct the deposition prior to the completion of document discovery.”) (citing *Fresenius Med. Care Holdings, Inc. v. Roxane Labs., Inc.*, 2007 WL 764302, at *2 (S.D. Ohio Mar. 9, 2007)).

In this case, Keurig took the 2019 deposition of Jim Rogers *prior to* requesting the Cobalt Arbitration documents that Keurig now relies on to request a second deposition. Keurig elected to depose Mr. Rogers without first seeking *any* discovery relating to any litigations filed by JBR. Having never asked, Keurig cannot now complain that JBR never disclosed documents pertaining to the Cobalt Arbitration to Keurig prior to Jim Rogers’ deposition. Moreover, despite learning of the Cobalt Arbitration within minutes of commencement of Jim Rogers’s first deposition,¹ Keurig did not bother to pause the questioning to request documents relating to the arbitration, nor did Keurig serve any document requests directed to those materials prior to commencement of the second day of his first deposition. Ex. A. If Keurig had done so, the parties could have met and conferred as to whether the materials could be produced in advance of the second day of the deposition.² Similarly, Keurig failed to hold open the deposition for continuation at a later date. Having made the choice to seek — and complete — Jim Rogers’ deposition before seeking the documents, Keurig waived any right to a second deposition based on documents it never requested.

Even after the Cobalt Arbitration documents were produced in July 2019, Keurig failed to pursue written discovery, document requests, or deposition testimony from any other knowledgeable witness relating to the Cobalt Arbitration.

This failure is not surprising because the actual content of the documents produced relates to legal advice that is nowhere tied to the parties’ claims and defenses and is cumulative of points Jim Rogers already testified to. Jim Rogers testified at length about: (a) JBR’s environmental labeling relating to biodegradability, (b) JBR’s consultation with an attorney before introducing those labels, and (c) JBR’s subsequent dissatisfaction with the attorney’s advice after the California District Attorneys disagreed with the attorney’s view of a California statute. Ex. A. JBR has already made clear in prior representations to the Court that it is not relying on that legal advice as a defense. ECF No. 641. Keurig has nowhere pointed to that legal advice as supporting Keurig’s counterclaim. The arbitration explored that advice at great length, with the arbitrator ultimately concluding that the statute was ambiguous and that JBR had a reasonable argument for refuting the District Attorneys’ position as to whether the California statute prohibited use of the word “biodegradable.” It makes no sense to spend six hours in deposition revisiting the details of legal advice that the arbitrator found to be reasonable in context of an ambiguous statute that JBR hired her to comply with. Jim Rogers’ further testimony would be cumulative.

¹ JBR did not place any restrictions on Keurig’s questioning, did not instruct the witness not to answer questions, and did not limit the amount of time Keurig could take in exploring the issues. Instead of questioning Jim Rogers in detail about the Cobalt Arbitration, Keurig elected to ask only a handful of questions and move on.

² Notably, Rogers later offered to produce the documents withheld as privileged pursuant to Rule 502(d) (ECF. No. 586-7 at p. 2 of 10), but Keurig rejected the request because it wanted to move to compel based on the notion that JBR engaged in a broad subject matter waiver. ECF No. 575.

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Keurig's attempt to characterize plaintiffs' depositions of Keurig witnesses as being in some way similar to Jim Rogers' first deposition misses the mark; the situations are not analogous.³ Given that Jim Rogers is co-CEO, Keurig should depose other witnesses and take other forms of discovery before resorting to a second deposition that takes crucial time away from an executive critical to JBR's day-to-day senior-level management and sales functions.

Finally, Keurig specifically stipulated that leave of Court would be required before deposing *anyone* – let alone a current senior executive – a second time. ECF No. 493-1 at III.E.1. (p. 4 of 14). The stipulation was intended to prevent parties from deposing a witness early in discovery and then again at the end. Keurig's request should be denied in light of the case law, the procedural history, and the stipulation.

Respectfully submitted,

/s/ Mario Moore
Mario Moore

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cc: Counsel of Record (via ECF and email)

³ In contrast to Keurig's request, plaintiffs' depositions have largely focused on ex-Keurig employees, who are the individuals most knowledgeable about Keurig's conduct during most of the events relevant to plaintiffs' cases. Because those individuals are no longer employed by Keurig, plaintiffs' depositions have imposed little — if any — burden on Keurig in terms of distracting Keurig's current senior management from their day-to-day responsibilities. Each plaintiffs' deposition of a current or former Keurig employee is relevant to up to five different plaintiffs' lawsuits against Keurig, and plaintiffs have minimized the burden by coordinating among one another so that each deposition covers five plaintiffs' cases, avoiding a situation in which a deponent is subject to multiple depositions. Plaintiffs' lawsuits involve over a dozen claims each, and a relevant time frame of at least eleven years (2009-present). By contrast, Keurig's request for a second deposition of Jim Rogers relates to a *single* claim by a *single* party and involves conduct over a six year time frame. Given this backdrop, Keurig's reference to depositions of a couple Keurig witnesses that lasted multiple days is misplaced, as those depositions are irrelevant to the question of whether a second deposition of a senior JBR executive is cumulative and overly burdensome.

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: KEURIG GREEN MOUNTAIN
SINGLE SERVE COFFEE ANTITRUST
LITIGATION.

JBR, INC., D/B/A ROGERS FAMILY
COMPANY,

Plaintiff,

vs.

KEURIG GREEN MOUNTAIN, INC.
F/K/A GREEN MOUNTAIN COFFEE
ROASTERS, INC. AND AS SUCCESSOR
TO KEURIG, INCORPORATED,

Defendant.

Case No.
1:14-cv-04242
VSB-HBP

CONFIDENTIAL - ATTORNEYS' EYES ONLY

VIDEOTAPED DEPOSITION OF
JAMES DWIGHT ROGERS, II
Sacramento, California
Tuesday, February 12, 2019
Volume I

8:59 a.m. - 5:04 p.m.

Total time on record: 6 hours 21 minutes

Reported by:

LISA RICHARDSON, RPR, CRR, RMR

CSR No. 5883

Job No. 3205267

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UNITED STATES DISTRICT COURT
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In Re: KEURIG GREEN MOUNTAIN
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ROASTERS, INC. AND AS SUCCESSOR
TO KEURIG, INCORPORATED,

Defendant.

Case No.
1:14-cv-04242
VSB-HBP

Videotaped Deposition of JAMES DWIGHT
ROGERS, II, Volume I, taken on behalf of Keurig
Green Mountain, at 1 Capitol Mall, Sacramento,
California, beginning at 8:59 a.m., and ending at
5:04 p.m., on Tuesday, February 12, 2019, before
Lisa Richardson, Certified Shorthand Reporter No.
5883.

VERITEXT LEGAL SOLUTIONS
MID-ATLANTIC REGION
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Philadelphia, PA 19103

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8 Videographer: John Macdonell

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1 JAMES DWIGHT ROGERS, II,
2 having been administered an oath, was examined and
3 testified as follows:

4 EXAMINATION

5 BY MS. BRANNON:

6 Q Good morning, Mr. Rogers.

7 A Good morning.

8 Q I'm Leah Brannon. I represent Keurig Green
9 Mountain, and I will be asking you questions today.

10 Could you please state your full name for 09:00:24
11 the record?

12 A Do you want the full formal name?

13 Q Full formal name.

14 A James Dwight Rogers, II.

15 Q What is your business address? 09:00:33

16 A The business address is 1731 Aviation
17 Boulevard, Lincoln, California.

18 Q Have you had your deposition taken before?

19 A I have.

20 Q How many times? 09:00:39

21 A Twice before.

22 Q Okay. And what were those prior cases?

23 A The first case was when Keurig sued us for
24 patent infringement. The second one was in the
25 matter of a malpractice suit we filed against an 09:00:52

1 attorney in, in Berkeley, California.

2 Q Which attorney was that suit against?

3 A It was against a woman named Tsan
4 Abrahamson of Cobalt Law.

5 Q And when was that case filed, if you 09:01:04
6 recall?

7 A I don't recall.

8 THE WITNESS: Do you recall, Dan?

9 MR. JOHNSON: No.

10 BY MS. BRANNON: 09:01:12

11 Q Okay. So you've done this before. You've
12 had your deposition taken before.

13 A Yes.

14 Q You probably know a bit about the
15 procedures and obligations, but I thought I would 09:01:21
16 just quickly go over some rules so that we are all
17 on the same page --

18 A Okay.

19 Q -- if that's okay.

20 A Hmm-hmm. 09:01:27

21 Q So our conversation today will be recorded
22 by Ms. Richardson.

23 Do you understand that you need to speak up
24 and give verbal answers so that she can take them
25 down? 09:01:36

1 A No, not that I know of.

2 Q You believe Costco in the Midwest carries
3 only Keurig?

4 A I believe so, but I do not know that to be
5 a fact. 11:20:37

6 Q What about Costco on the East Coast? Do
7 they carry only Keurig?

8 A I do, I do not know, but they don't, they
9 don't carry us.

10 Q So you don't know whether they carry other 11:20:45
11 unlicensed portion packs?

12 A I have not noticed any, but I can't say
13 definitively.

14 Q And you said OneCups are still about 40
15 percent of JBR's business? 11:20:59

16 A That's correct.

17 Q Are your total sales greater now than they
18 were in March of 2015?

19 A No. They are about the same.

20 Q You said to the reporter that JBR's portion 11:21:10
21 packs are 97 percent biodegradable. You said the
22 cup is a food grade plastic mesh.

23 Was that true at the time, that the cup was
24 a food grade plastic mesh?

25 A There's no cup. I -- can you rephrase 11:21:46

1 that?

2 Q The article here quotes you as saying, "The
3 cup is a food grade plastic mesh stretched to the
4 exact porosity so coffee will brew correctly."

5 A That's a typo. 11:22:00

6 Q So you don't think you said the word cup?

7 A No. We don't have a cup on our product.

8 Q What do you call the plastic mesh?

9 A Plastic mesh.

10 Q Just plastic mesh? 11:22:11

11 A Yes.

12 Q And you don't use the word cup?

13 A No.

14 Q Have you ever used the word cup?

15 A No. 11:22:19

16 Q You've never referred to the plastic mesh
17 that the OneCup is in as a cup?

18 A No.

19 Q Okay. It says here, "Because the pods
20 aren't plastic, the coffee can go stale more 11:22:36
21 quickly."

22 Is that true?

23 A That is true. That's why we put them in
24 that, in that bag.

25 Q Further down, you talk about the Freedom 11:22:48

1 changed much. It's -- you know, the box has gone
2 through many iterations.

3 And, you know, say, my brother JR, John,
4 would have general oversight on the retail side,
5 grocery side, and I would have general oversight on 04:27:53
6 the club pack side. What to say, things like that,
7 we do have, you know, advisors, etc.

8 Q Who are your advisors?

9 A Well, we had one, we had one -- we hired an
10 attorney when we first started making progress in 04:28:09
11 this direction.

12 We were very excited about it. We were
13 very proud of it, because it was first to market.

14 And we hired an environmental attorney to
15 advise us as to what to say. 04:28:19

16 Q And who is that?

17 A Her name is Tsan Abrahamson with Cobalt
18 Law.

19 MR. JOHNSON: Spell the first name for the
20 court reporter. 04:28:29

21 THE WITNESS: A-B-R -- I believe it's
22 A-H-A-M-S-O-N.

23 MR. JOHNSON: Tsan is T-S-A-N.

24 THE WITNESS: T-S-A-N.

25 We didn't want to be disingenuous. We 04:28:43

1 wanted to say the right thing.

2 BY MS. BRANNON:

3 Q Did you hire any other advisors to help you
4 with your environmental claims?

5 A I do not recall. We had an in-house 04:28:53
6 packaging design person at the time, who helped us
7 with the design and layout.

8 Q Did you consult with any other lawyers
9 beyond Ms. Abrahamson?

10 A I do not recall. As far as the 04:29:08
11 environmental claims go, it was mostly just
12 Ms. Abrahamson.

13 Q What do you understand the term
14 biodegradable to mean?

15 A Well, I currently understand it to be much, 04:29:21
16 much different than I did several years ago.

17 Q What is your current understanding of the
18 term?

19 A Current understanding of the term is
20 something that will degrade under normal conditions, 04:29:29
21 but I don't -- I'm not, I'm not an expert. I'm, I'm
22 just a layman.

23 It's -- you know, a much more pertinent
24 term for us is compostability, but we didn't know
25 that at the time. 04:29:47

1 Q For something to be biodegradable, does it
2 need to degrade under normal conditions in a
3 particular period of time?

4 A I don't really under -- I don't really
5 remember what the term is or what the specification 04:30:00
6 is. I believe there are different standards, ATSM
7 6400, things like that, but I don't recall what the
8 specifications are.

9 Q What does the term compostable mean to you
10 today? 04:30:17

11 A Compostable means something that will --
12 within a certain time frame, will degrade back into
13 dirt, basically, or some kind of soil.

14 Q What is that time frame? Is it one year?

15 A I don't know if it's specified. I don't 04:30:36
16 know. Again, you will have to look at the ATSM
17 standards.

18 Q Do you have an understanding of the
19 distinction between home compostable and industrial,
20 industrially compostable? 04:30:51

21 A I have a general layman's understanding.

22 Q What is your layman's understanding --

23 A My layman's understanding is something that
24 is compostable in a commercial composting facility.

25 A commercial composting facility treats the matter 04:31:06

1 that they take in differently. They do things like
2 chop it up. They apply heat to it. They turn it
3 regularly.

4 As far as home composting goes, I believe
5 you are familiar with home composters. I believe 04:31:19
6 that it's something you throw into a home composting
7 bin and -- I don't know. You turn it time to time,
8 and it turns into dirt.

9 Q You mentioned the green bin earlier and
10 throwing your OneCups into the green bin. 04:31:34

11 What is a green bin?

12 A Out here in California, many communities
13 have what we call a green bin, which is where you
14 put yard waste, branches, leaves, you know, you
15 know, plant matter that occurs in nature. And those 04:31:55
16 are taken to industrial facilities and composted.

17 Q Do you have any sense of what percent of
18 OneCup users have a green bin?

19 A There's no way to say that.

20 Q Do you know if, outside of California and 04:32:17
21 Seattle, anyone has a green bin?

22 A I would have no way of knowing that.

23 Q Within California, do some green bins
24 prohibit food products?

25 MR. JOHNSON: Objection, calls for 04:32:38

1 speculation.

2 THE WITNESS: I have no idea.

3 BY MS. BRANNON:

4 Q Is the OneCup a food product?

5 A I believe it is 100 percent compostable 04:32:48
6 inside and out.

7 Q Do you throw your used OneCups at home into
8 a green bin?

9 A I don't have one. In my -- sorry. In my
10 municipality, they don't have a green bin. 04:33:03

11 Q Which municipality are you in?

12 A It's in Placer County.

13 Q So what do you do with your used OneCups?

14 A I take them to work and put them in the
15 compost there. 04:33:17

16 Q Do you have an industrial compost at work?

17 A We have one -- we have the -- what we call
18 the dump, but they have a composting facility
19 nearby, yes.

20 Q So you bring them to work and put them in 04:33:31
21 the dump, and then they are transported from there
22 to an industrial composting facility?

23 A That's correct, but I don't know why what I
24 do has any import.

25 Q Do you know what industrial composting 04:33:45

1 facility those materials are taken to?

2 A No.

3 Q Do you know how a consumer could find an
4 industrial composting facility near them?

5 MR. JOHNSON: Objection, calls for 04:34:06
6 speculation.

7 THE WITNESS: There are, there are website
8 locators real easy to find. Type in your zip code.
9 There they are. That's all I know.

10 BY MS. BRANNON: 04:34:19

11 Q And then if consumers don't have a green
12 bin that accepts food products, they would need to
13 mail their used OneCups to an industrial composting
14 facility?

15 A I have no idea. I mean, the fact that 04:34:32
16 there is a lack of an industrial composting facility
17 nearby does not change the nature of the fact that
18 this item is compostable.

19 Q Do you have any sense of what percentage of
20 OneCups are actually composted? 04:34:49

21 A I would have no way of knowing.

22 Q Do you know if there are green bins in
23 Sacramento?

24 A I don't. It's a different county.

25 Q Were OneCups compostable when they first 04:35:06

1 launched?

2 A They were not.

3 Q When did you start using the term
4 compostable?

5 A I don't remember the exact date. You 04:35:22
6 probably have it there with your documents. It was
7 a long road. It took years and, and millions of
8 dollars to get to the point where we are now.

9 We, we, we were able to make certain
10 elements of that pod compostable piece by piece. 04:35:34
11 When it was completely compostable, we had to submit
12 it to a certification organization called BPI, where
13 they actually do the process.

14 They actually put it in for 90 days. They
15 put it in -- I don't know -- a dirt bed and, and see 04:35:50
16 if it degrades over 90 days.

17 Q So how does JBR currently recommend that
18 consumers dispose of their used OneCups?

19 A We just say that they are compostable in an
20 industrial facility. I don't, I don't recommend 04:36:04
21 what people do.

22 Q Was there a time when JBR recommended that
23 consumers take the packs apart and compost the
24 grounds and throw the ring in the trash?

25 A I believe there was a time, because there 04:36:18

1 was one phase at one point in time when the mesh to
2 which we have spoken before was the only element
3 that was not compostable.

4 Q I think you said before that nobody really
5 takes the packs apart. 04:36:34

6 A It's something that you can do if you want
7 to. I'm sure there are people in Berkeley that do.

8 MR. JOHNSON: Wait a minute.

9 THE WITNESS: I'm sorry. I went to
10 Berkeley. 04:36:43

11 BY MS. BRANNON:

12 Q What percent of consumers do you think
13 actually took apart the JBR packs?

14 A I would have no way of knowing.

15 Q Have you done any study of how consumers 04:36:51
16 dispose of packs?

17 A No.

18 Q Are the OneCups that are sold today
19 recyclable?

20 A I don't have any idea. Recycling is a 04:37:04
21 completely different process, where
22 petrochemicals -- there are five or six different
23 types of petrochemicals -- are separated by the
24 little number around the arrows at the bottom. They
25 are separated in different categories and recycled. 04:37:21

1 This is an entirely different plastic
2 matter, which is made from plants. I don't know
3 how -- if it would be recyclable. If you tried to
4 recycle it, it would turn into dirt. So --

5 Q Do you know what happens if you put a used 04:37:34
6 OneCup into the recycling?

7 A No idea.

8 Q If someone just throws the used OneCup in
9 their trash can, does it biodegrade?

10 A I don't know. I think you are implying 04:37:49
11 that I am some kind of scientist that I am not.

12 Q Would a OneCup biodegrade in a landfill
13 faster than a K-Cup?

14 A I don't know.

15 Q Who would be the best person at JBR to ask 04:38:08
16 questions about this?

17 A I don't think anyone could answer those
18 kind of questions. Those are scientific questions.
19 You'd probably need an expert.

20 Q So has JBR ever retained an outside expert 04:38:20
21 to help it analyze its different environmental
22 claims?

23 A We are very simple people. We developed a
24 product that is compostable -- that has been
25 certified as compostable. That's as far as we've 04:38:40

1 gone.

2 What happens after they take it home, I
3 have no control. I have no, no data.

4 Q Do you recall when BPI certified your
5 OneCup as industrially compostable? 04:38:51

6 A I don't recall the exact date, but I could
7 certainly find it.

8 Q Prior to the BPI certification, had you
9 submitted OneCups to any environmental certification
10 body? 04:39:08

11 A I don't understand the question. You will
12 have to be more specific.

13 Q Before you sought the BPI industrial
14 compost -- industrially compostable certification,
15 did you seek any other environmental certifications? 04:39:21

16 A Such as?

17 Q Such as home compostable from Vencott, or
18 to the extent that there were bodies certifying
19 biodegradability, marine biodegradability, or other
20 environmental terms, did you submit to any other 04:39:41
21 certification body?

22 A I believe BPI was the first. To my
23 knowledge, there are no certification agencies in
24 this country.

25 BPI is, I believe, in Belgium. We got our 04:39:50

1 certification from them. They are renowned as the
2 best.

3 We also are working on our home
4 compostability with Vencott.

5 Q You are currently working on that? 04:40:04

6 A That's correct.

7 Q And who at JBR is taking the lead on that?

8 A My brother Pete.

9 Q You said you are working on home
10 compostability. 04:40:23

11 Do you know if, at present, the OneCups
12 leach any contaminants into the soil?

13 A I believe no, because there are -- part of
14 the BPI certification is, they -- I'm not sure what
15 they are, but after the, the, the pod has 04:40:38
16 decomposed -- is composted, they put seeds in there.

17 And a certain amount of those seeds have to
18 grow, which is a test for any kind of, any kind of,
19 you know -- I'm looking for the word. I can't think
20 of it -- contamination. 04:40:57

21 Q JBR launched the OneCup bio product in
22 October of 2013.

23 How did the manufacturing process differ
24 between the first OneCup that you launched in --
25 around October 2011 and the OneCup bio that you 04:41:12

1 launched in October of 2013?

2 A The OneCup bio had a -- and it turns out,
3 as I told you, we received the wrong advice.
4 Biodegradable was the wrong term to use.

5 Compostable would have been the right term to use. 04:41:28

6 By that point, two years later, as you, as
7 you referenced, the lid of our, of our pod and the
8 corn ring had become compostable, as well as the
9 mother bag in which the pods are placed.

10 Q At that point, the plastic mesh was still 04:41:45
11 not compostable?

12 A Correct.

13 Q And then how has the design of the OneCup
14 changed between the OneCup bio product in October of
15 2013 and the one that you currently make today? 04:42:14

16 A We finally found a material that we
17 could -- a PLA based compostable material from the
18 mesh that we could use in our, in our product.

19 Q And do you recall when you launched the 100
20 percent compostable product? 04:42:29

21 A I do not. It would have been after our BPI
22 certification.

23 Q Do you know if consumers have found JBR's
24 environmental marketing claims confusing?

25 A I don't believe so. 04:42:49

1 MS. BRANNON: Okay. I'd like to mark an
2 e-mail from Lisa Smoot to you. It's dated
3 September 9th, 2011. And the Bates label is
4 ROG001885855.

5 This is Defendant's Exhibit 45. 04:43:09

6 (Exhibit 45 was marked.)

7 THE WITNESS: Okay.

8 BY MS. BRANNON:

9 Q This is an e-mail from Lisa Smoot. That's
10 your sister? 04:44:10

11 A That's correct.

12 Q And she's discussing some testing that JBR
13 did prior to launching the original OneCup in 2011?

14 A The test she's referring to is a taste test
15 we did with a consumer panel. It has nothing to do 04:44:25
16 with environmental responsibility, compostability,
17 or biodegradability.

18 At the time, in September of 2011, this was
19 a plastic product. We are, we are just saying This
20 is a great product. It was 30 percent less plastic. 04:44:39
21 What do we say?

22 Q And the consumers were writing in these
23 answers that they liked the product, because it had
24 less packaging, less waste, no plastic, and so
25 forth? 04:44:58

1 A Less plastic at the time.

2 Q It looks like --

3 A Less plastic.

4 Q It looks like one of the consumers wrote no
5 plastic.

04:45:04

6 A These are my, my sister's ideas, and some
7 of them are off base.

8 At this time, we were -- it was a plastic
9 product that used 30 percent less plastic.

10 We had a consumer test panel, 3 or 400
11 people that tried this product, and this is what --
12 to what she was referring.

04:45:13

13 Now we are talking about, "What can we call
14 this? What do we say? What do we do with this?"

15 Q It looks like at least one consumer wrote
16 in "recyclable"?

04:45:29

17 A I believe those are all my sister's ideas.
18 I'm not sure.

19 MS. BRANNON: Okay. You can set that one
20 aside.

04:45:42

21 I'd like to mark an e-mail from you to your
22 brother Pete, dated October 22nd, 2013. Bates label
23 is ROG001732960.

24 This is Defendant's Exhibit 46.

25 (Exhibit 46 was marked.)

04:46:21

1 THE WITNESS: This is two years later.

2 BY MS. BRANNON:

3 Q Yes. I believe this is an online customer
4 service chat. And I'm guessing this relates to the
5 OneCup bio?

04:46:42

6 A What happened with this was, the first
7 element of our product that was compostable was the
8 mother bag. And so we called it compostable.

9 Upon the advice of our, of our attorney,
10 which turned out to be a disaster, she recommended 04:46:57
11 we, recommended we change it to biodegradable.

12 So there was some confusion in this that
13 people were wondering if everything was compostable
14 or just the bag was compostable.

15 So I believe that we changed the bag 04:47:11
16 verbiage to say, "This bag is compostable." I don't
17 really recall, but --

18 Q In your e-mail here, you say, "We are
19 getting this a lot. Can we change this to explain
20 better, like, this bag is compostable?" 04:47:27

21 A As I just said.

22 Q So it sounds like there was a fair amount
23 of consumer confusion about what was or was not
24 compostable?

25 MR. JOHNSON: Objection, calls for 04:47:38

1 speculation, assumes facts not in evidence.

2 BY MS. BRANNON:

3 Q Your e-mail says, "We are getting this a
4 lot." What did you mean by that?

5 A When people call customer service, you have 04:47:53
6 to, you have to think that there are probably other
7 people out there who are having the same issue.

8 So when I get a few of these, I'm
9 wondering, "What can we do about this?"

10 "We're getting this a lot" is to place 04:48:08
11 emphasis on, "Let's do something quickly."

12 There are people here like Chris Miller
13 that were like rolling a boulder uphill to get him
14 to move.

15 So that was, that was the intent of this. 04:48:19
16 What do we do about this?

17 Q So you had seen multiple consumers asking
18 about what was compostable?

19 A I would say more like a few.

20 Q So you wrote, "We are getting this a lot," 04:48:31
21 but you believe you actually only had a few
22 customers express confusion?

23 A I only heard of a few.

24 Q And you were writing -- you write, "We are
25 getting this a lot," because you wanted Chris Miller 04:48:47

1 to do something about it, and you were worried --

2 A Right.

3 Q -- that if you just said, "We've had a few
4 consumers ask questions," he wouldn't move fast
5 enough?

04:48:58

6 A In my opinion, two is too many. I don't
7 want to get any complaints.

8 Q And your recollection is that you did, in
9 fact, change the labeling, at least for a period of
10 time, to say --

04:49:12

11 A I believe so.

12 Q -- "This bag is compostable"?

13 A I believe so.

14 Q And then after that, you changed it to say
15 biodegradable at some point?

04:49:19

16 A Right. On our attorney's advice.

17 MS. BRANNON: Okay. I'd like to mark
18 another e-mail. This is from you to Emily
19 DiDomenico. It's dated October 23rd, 2013. And the
20 Bates label is ROG001732965.

04:49:57

21 This is Defendant's Exhibit 47.

22 (Exhibit 47 was marked.)

23 THE WITNESS: Okay.

24 BY MS. BRANNON:

25 Q I think you testified earlier that Emily

04:51:04

1 DiDomenico is the customer service rep who later
2 changed her name to Emily Eaton?

3 A Emily Eaton is her married name, yes.

4 Q Okay. And is she often the first person to
5 speak with consumers who contact JBR? 04:51:19

6 A Sometimes.

7 Q Does she receive guidance or training on
8 how to interact with customers?

9 A She does.

10 Q How is that guidance developed? 04:51:28

11 A Seat of the pants, mostly. They are given
12 general direction. I try and hire people who, who
13 are able to, you know, speak intelligently for
14 themselves and for us.

15 Q And I think you said you sometimes review 04:51:41
16 the chat transcripts?

17 A Yes.

18 Q And provide guidance?

19 A Yes.

20 Q Here, the customer is asking whether they 04:51:52
21 could purchase a particular OneCup product in
22 biodegradable form, and Emily told the customer that
23 a 100 percent biodegradable version is not available
24 yet?

25 A Correct. 04:52:12

1 Q And then it looks like eight minutes after
2 you received the transcript, you followed up with
3 her and Mr. Yamauchi and Lisa Wallach to say, "All
4 are the same bio. It is just that the box isn't
5 calling it out yet."

04:52:30

6 A Yes. The same level of biodegradability,
7 which was -- at the time, things were very confusing
8 for us, what to say. And so biodegradable was the,
9 was the word of the moment.

10 What I, what I meant when I said that was, 04:52:43
11 all items offered the same biodegradability. So
12 each -- the elements are all the same.

13 The things that are biodegradable are
14 biodegradable. Things that are not, are not. It
15 doesn't depend on the count. 04:52:53

16 Q And who is Lisa Walloch?

17 A Lisa Walloch is also a customer service
18 representative.

19 Q Is she still with the company?

20 A She is. 04:53:01

21 Q And why was the box not -- why were the
22 boxes not using the same environmental wording?

23 A I believe, at this time, we were testing,
24 and we didn't, we didn't want to call anything out.

25 And there's also the element that -- okay. 04:53:17

1 Some of our fast moving items, we might be
2 into the biodegradable elements. Some of the slower
3 things, like, you know, Decaf Hazelnut, there might
4 be still plastic elements in there that -- so
5 calling it out would be disingenuous. 04:53:30

6 Q Your advice is that all of the items
7 actually are biodegradable to the same degree --

8 A Yes.

9 Q -- at that point?

10 A The same level. So the things that are 04:53:44
11 biodegradable are on all items -- on all count
12 items. Okay?

13 Q I see.

14 A Like 12 count, 36 count, 80 count.

15 Q I see. 04:53:54

16 So it could be that the Fog Chaser is not
17 yet biodegradable, but if a French Roast is
18 biodegradable, it's biodegradable in the 12 count
19 and the 120 count.

20 A Exactly. And we just elected not to call 04:54:03
21 anything out yet, until we were sure that everything
22 was, was at the same level.

23 Q And then Emily writes back to you and says,
24 "So we are allowed to say that the 80 counts are
25 biodegradable. The boxes just don't say it yet?" 04:54:18

1 And you write back and say, "Yes.

2 Everything is being manufactured the same."

3 And then it looks like you forward that to
4 your brother Pete and Olivia Ornales and say,
5 "Right?"

04:54:34

6 A Yeah. I don't recall what this referred
7 to. I, I thought I was pretty clear in telling
8 everyone that all items of a particular coffee had
9 the same level of biodegradability.

10 I think she got a little confused. And my 04:54:50
11 response might have been equally confusing, because
12 we hadn't changed anything at the time, but there --
13 like I said, there was back stock of, say, old
14 things that were plastic, which is why we weren't
15 calling things out. 04:55:03

16 Q But you are telling Emily that all of the
17 80 counts are biodegradable, whether it calls it out
18 or not?

19 A That's not what I meant. I said everything
20 is being manufactured the same, whether it's 80 04:55:18
21 count, 12 count, 36 count, whatever. They are all
22 the same.

23 So the ones that aren't biodegradable
24 aren't, and the ones that are, are. So if I didn't
25 make that clear, that's my bad. 04:55:29

1 Q And then you run this by Pete and Olivia
2 Ornelas to double-check --

3 A Right.

4 Q -- that you've given the right advice.

5 Do you recall whether they wrote you back 04:55:43
6 or what they said?

7 A I don't recall.

8 Q Do you recall when you first learned that
9 using the term biodegradable might not be lawful?

10 A I recall the incident, but not the date. 04:56:03

11 Q What was the incident?

12 A A consumer who -- I can't remember the
13 organization she was affiliated with -- had said
14 that it might not be the right term to use.

15 MS. BRANNON: Okay. I will mark another 04:56:20
16 document here. Actually -- so this is another
17 customer service transcript. It's dated March 4th,
18 2015. The Bates label is ROG001907665.

19 And this is Defendant's Exhibit 48.

20 (Exhibit 48 was marked.) 04:56:55

21 THE WITNESS: Thank you.

22 Okay.

23 BY MS. BRANNON:

24 Q So was this customer service chat
25 transcript sent to you? 04:57:52

1 A I believe it was.

2 Q Do you recall whether you reviewed it at
3 that time?

4 A I'm sure I did.

5 Q It looks like a customer is asking about 04:57:58
6 how to dispose of the OneCup properly and says that
7 she's confused about what to do.

8 She says, when she takes it apart, it's a
9 huge mess. "Am I, in fact, supposed to take it
10 apart?" 04:58:21

11 And Emily writes her back and says, "By
12 simply disposing your pod in the trash, it will
13 degrade in the landfill completely within a year.
14 You do not need to take it apart."

15 Was that an accurate statement when Emily 04:58:35
16 made it?

17 A I don't know. I, I think that was our
18 belief at the time. We were still learning this.
19 We were -- there was a lot of -- like I said, a lot
20 of confusion going on. Didn't know what to say. 04:58:46

21 You know, did a lot of Google research,
22 things like that, and, you know, knowing what I know
23 now, probably not the right thing to say.

24 Q Does the OneCup biodegrade in the landfill
25 completely within a year? 04:59:01

1 A I have no idea.

2 Q Have you been told that it doesn't?

3 A I haven't been told that it does or
4 doesn't. Hence, the fact that I have no idea.

5 Q Have you been told that plant based 04:59:14
6 plastics behave the same way as other plastics in
7 landfill?

8 A I have not been told that.

9 Q This particular consumer, Amber, seems to
10 be happy with the answer she received. 04:59:45

11 And she goes on and says, "By the way,
12 everyone in the office is smiling and feeling so
13 much less guilty about using K-Cups."

14 What do you understand that to mean?

15 MR. JOHNSON: Objection, calls for 05:00:00
16 speculation.

17 BY MS. BRANNON:

18 Q What do you understand the consumer to
19 mean?

20 A It sure seems pretty clear to me. 05:00:06

21 Q What do you think --

22 A I can read it back to you if you like, but,
23 you know, I'm just reading exactly what she says. I
24 wasn't there. I didn't talk to her. So I don't
25 know. 05:00:19

1 Q You've never heard of this?

2 A I, I can't, I can't answer your question.

3 I do -- you asked if I knew. I do not know.

4 Q What do you think the consumer means by so

5 much less guilty about using K-Cups?

05:02:22

6 MR. JOHNSON: Objection, calls for

7 speculation.

8 THE WITNESS: Again, I, I don't know where

9 this is going. I wasn't there. I didn't talk to

10 them. I can't draw conclusions.

05:02:30

11 BY MS. BRANNON:

12 Q Do you recall telling Emily that she can't

13 tell consumers to -- that OneCups will degrade in

14 the landfill completely within a year?

15 A I believe I did after -- as a result of

05:02:59

16 this or after this. Like I said, there was a lot of

17 confusion going on right now. This is brand new

18 back in the day, brand new.

19 Q When would you have delivered that message

20 to Emily?

05:03:10

21 A I would have no idea.

22 Q Do you have any sort of timeline, showing

23 how your environmental claims changed over time?

24 A I could probably scratch something out.

25 Q There's nothing you've created in the

05:03:38

1 ordinary course --

2 A There might be.

3 Q -- that keeps track?

4 A There might be. Do you know how many

5 documents I have on my computer? About 20,000. 05:03:45

6 Q If JBR had an ordinary course business
7 document that tracked its environmental claims, who
8 would keep that document?

9 A I don't know if the document, document
10 exists. So I don't know who would keep it. 05:04:03

11 Q Who would be most likely to be responsible
12 for tracking marketing claims?

13 A I still can't answer that question.

14 MS. BRANNON: I see we are a little bit
15 past five o'clock. Do you want to -- 05:04:27

16 MR. JOHNSON: Sure.

17 MS. BRANNON: -- break it off here and pick
18 up?

19 THE WITNESS: Sure. Let's do that.

20 MR. JOHNSON: Let's take a quick break. 05:04:31

21 What's the hour? Where are we at? Are we
22 at five hours?

23 THE WITNESS: Six.

24 THE VIDEOGRAPHER: 6 hours, 22 minutes, on
25 the record. 05:04:42

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California do hereby
3 certify:

4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth;
6 that any witnesses in the foregoing proceedings,
7 prior to testifying, were duly sworn; that a
8 verbatim record of the proceedings was made by me
9 using machine shorthand which was thereafter
10 transcribed under my direction; that the foregoing
11 transcript is an accurate transcription thereof.

12 I further certify I am neither financially
13 interested in the action nor a relative or employee
14 of any attorney or any of the parties.

15 IN WITNESS WHEREOF, I have this date
16 subscribed my name.

17
18 Dated: February 26, 2019
19
20

21 
22

LISA RICHARDSON, RPR, CRR, RMR
CSR No. 5883

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: KEURIG GREEN MOUNTAIN
SINGLE SERVE COFFEE ANTITRUST
LITIGATION.

JBR, INC., D/B/A ROGERS FAMILY
COMPANY,

Plaintiff,

vs.

KEURIG GREEN MOUNTAIN, INC.
F/K/A GREEN MOUNTAIN COFFEE
ROASTERS, INC. AND AS SUCCESSOR
TO KEURIG, INCORPORATED,

Defendant.

Case No.
1:14-cv-04242
VSB-HBP

CONFIDENTIAL - ATTORNEYS' EYES ONLY

VIDEOTAPED DEPOSITION OF

JAMES DWIGHT ROGERS, II

Sacramento, California

Wednesday, February 13, 2019

Volume II

8:57 a.m. - 12:25 p.m.

Total time on record: 2 hours, 45 minutes

Stenographically Reported by:

LISA RICHARDSON, RPR, CRR, RMR

CSR No. 5883

Job No. 3205277

PAGES 275 - 424

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: KEURIG GREEN MOUNTAIN)
SINGLE SERVE COFFEE ANTITRUST)
LITIGATION.)

JBR, INC., D/B/A ROGERS FAMILY)
COMPANY,)

Plaintiff,)

vs.)

KEURIG GREEN MOUNTAIN, INC.)
F/K/A GREEN MOUNTAIN COFFEE)
ROASTERS, INC. AND AS SUCCESSOR)
TO KEURIG, INCORPORATED,)

Defendant.)

Case No.
1:14-cv-04242
VSB-HBP

Videotaped Deposition of JAMES DWIGHT
ROGERS, II, Volume II, taken on behalf of Keurig
Green Mountain, at 1 Capitol Mall, Sacramento,
California, beginning at 8:57 a.m., and ending at
12:25 p.m., on Wednesday, February 13, 2019,
before Lisa Richardson, Certified Shorthand Reporter
No. 5883.

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8 Videographer: John Macdonell
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1 Sacramento, California, Wednesday, February 13, 2019

2 8:57 a.m.

3 --oOo--

4 (Exhibit 49 was marked.)

5 THE VIDEOGRAPHER: Okay. We are on the 08:57:51
6 record. It's 8:57 a.m. on February 13th, 2019.

7 This is the deposition of James Rogers,
8 Volume II.

9 We are here in the matter of Keurig Green
10 Mountain Single-Serve Coffee Antitrust Litigation. 08:58:07

11 We are located at 1 Capitol Mall in
12 Sacramento, California.

13 I'm John Macdonell, the videographer, with
14 Veritext.

15 Mr. Rogers remains under oath. 08:58:19

16 Please proceed.

17 JAMES DWIGHT ROGERS, II,
18 having been previously sworn, testified as follows:

19 EXAMINATION

20 BY MS. BRANNON: 08:58:21

21 Q Welcome back, Mr. Rogers.

22 A Hello.

23 Q We were talking yesterday afternoon about
24 JBR's environmental advertising. And I asked if you
25 recalled when you first learned that using the term 08:58:32

1 biodegradable might not be lawful.

2 And I believe you testified that you recall
3 the incident, but not the date. And you said that a
4 consumer affiliated with an organization raised the
5 issue. 08:58:47

6 Do you remember that testimony?

7 A I do.

8 Q So I've marked as Exhibit 49 -- sorry.

9 MS. BRANNON: I think we just had two more
10 joins on the phone line. 08:58:56

11 Who joined?

12 MR. MOORE: Good morning. This is Mario
13 Moore, representing JBR.

14 MS. BRANNON: Hi, Mario.

15 MR. MILLER: And this is Evan Miller, 08:59:05
16 representing TreeHouse.

17 MS. BRANNON: Great.

18 BY MS. BRANNON:

19 Q So the court reporter has marked as
20 Exhibit 49, Defendant's Exhibit 49 to the Jim Rogers 08:59:13
21 deposition, an e-mail from Jim Zelinski to your
22 father, Jon Rogers. It's dated September 24th,
23 2014. And the Bates label is ROG001805753.

24 You've had a chance to look at this e-mail?

25 A I have. 08:59:39

1 Q Do you recognize it?

2 A I do not.

3 Q Is this the incident that you were speaking
4 of --

5 A It was not. 08:59:45

6 Q Do you recall whether Californians Against
7 Waste was the organization?

8 A It was not.

9 Q Do you recall the name of the organization?

10 A My first, my first inkling of the fact that 08:59:59
11 we might have used the wrong term for our product
12 was in approximately January of 2015.

13 It was a woman named -- I think it was --
14 her name was MacMillan. And she was an advisor to a
15 panel for the California State Assembly on, I 09:00:21
16 believe, environmental issues.

17 I, I was not privy to this e-mail, and I
18 was not involved in this conversation. So I was --
19 I did not have any dealings with California Against
20 Waste at this time. 09:00:35

21 Q Do you know if your father shared this with
22 anyone else at the company?

23 A I do not know.

24 MS. BRANNON: Okay. I'd like to mark
25 Defendant's Exhibit 50 to the Jim Rogers deposition. 09:00:55

1 This is an e-mail from you to your father, dated
2 January 27th, 2015. The Bates label is
3 ROG001907402.

4 (Exhibit 50 was marked.)

5 THE WITNESS: Thank you. 09:01:22

6 Okay.

7 BY MS. BRANNON:

8 Q Is this the first time you learned about
9 the issue with the use of the term biodegradable?

10 A Yes. 09:02:08

11 Q And this is an e-mail being forwarded to
12 you by Costco?

13 A Correct.

14 Q Who is John Sullivan?

15 A I believe he is counsel to Costco, to 09:02:20
16 Costco Wholesale.

17 Q He's an in-house lawyer?

18 A I believe so.

19 Q Mr. Sullivan says that a consultant to a
20 legislative committee in California has communicated 09:02:29
21 her observation that the biodegradable claim on
22 OneCups is unlawful under California law, and Costco
23 asked you for a response as soon as possible.

24 Your father calls this a typical
25 bureaucratic screw-up. 09:02:49

1 And you reply and say, "It's not that. I
2 got this."

3 What did you mean by that?

4 A It wasn't a bureaucratic screw-up. As I,
5 as I mentioned previously this morning, this is the 09:03:01
6 first I'd heard that there might be an issue with
7 using the term biodegradable.

8 Now, please recall that we used the term
9 biodegradable only after engaging an environmental
10 attorney, who advised us to use that term. 09:03:13

11 And we thought we were in the clear,
12 because of the extensive research we had done and
13 the extensive communication with this attorney.

14 So when I said I got this, first of all,
15 I'm the one who handles the Costco account. 09:03:26

16 And, second of all, I was offering to
17 contact this person and, and find out what the
18 problem was.

19 And this is the issue to which I referred
20 earlier this morning. 09:03:37

21 Q When you say contact this person, do you
22 mean the legislative consultant?

23 A That's correct.

24 Q And did you speak with the legislative
25 consultant? 09:03:48

1 A I did.

2 Q And what did the legislative consultant
3 say?

4 A She, she reiterated, reiterated what she
5 had said in this e-mail, that we are -- that using 09:03:55
6 the term biodegradable, even though it's an obsolete
7 law, was, was not lawful in California.

8 Q What did you say to her?

9 A You probably have e-mails regarding this,
10 but we had some discussions in January and into 09:04:15
11 February.

12 And at the time, I still was not aware that
13 we were in any kind of violation, but, nevertheless,
14 I offered to remove that from all packaging, which
15 we did. And that removal occurred in February and 09:04:29
16 March of 2015.

17 Q Did you talk with your environmental lawyer
18 at this time?

19 A Certainly.

20 Q Did you talk with any other lawyer at this 09:04:45
21 time to get a second opinion?

22 A I did not.

23 Q You said you removed the biodegradable
24 label in February and March of 2015?

25 A That's when we began doing so, yes. 09:05:06

1 Q How long did it take you to fully remove
2 the biodegradable label?

3 A That's a difficult question to answer,
4 because we have stock of many, many boxes. We
5 didn't feel at this time, and no one had advised us 09:05:19
6 at this time, that there was any degree of urgency
7 to doing so.

8 So we ran through what we had and made the
9 change as necessary. So, obviously, the first one
10 that probably would have been changed is the box 09:05:31
11 going to Costco.

12 Like I said -- mentioned yesterday, you
13 have a lot of very slow moving items, like Decaf
14 Hazelnut, where it might have been, you know, some
15 time, but we began this process in February of 2015. 09:05:44

16 Q When would the last biodegradable
17 advertising have stopped appearing on the market?

18 A I can't give you a specific date, but,
19 certainly, by, I believe, April for Costco. And,
20 and it trickled out through the rest of retail 09:06:04
21 throughout -- you know, through mid, mid 2015
22 probably.

23 Q Do you think all of the biodegradable
24 advertising was gone by late 2015?

25 A I can't tell you definitively, but I would 09:06:24

1 assume so.

2 Q What did you replace the biodegradable
3 advertising with?

4 A We replaced it with a very simple statement
5 that said, "No plastic cup. Just great coffee." 09:06:39

6 Obviously, you've seen our pods, and there
7 is no plastic cup on our pods.

8 Q Did you discuss the no plastic cup claim
9 with the legislative consultant?

10 A I don't believe we did. I believe her 09:06:54
11 concern was the biodegradable callout. We might
12 have, but I -- you probably have an e-mail trail
13 there that can tell me more accurately.

14 Q Did you prepare a written response for
15 Costco in response to their question here? 09:07:26

16 A I don't recall exactly who I contacted at
17 Costco regarding this.

18 MS. BRANNON: I'd like to mark a letter
19 dated August 11, 2015. This is Defendant's
20 Exhibit 50 to the Jim Rogers deposition. And -- 09:07:51
21 50 -- sorry. 51, Defendant's Exhibit 51. And the
22 Bates label is ROG001910499.

23 (Exhibit 51 was marked.)

24 THE WITNESS: Thank you.

25 Okay. 09:08:48

1 BY MS. BRANNON:

2 Q Do you recognize this document?

3 A Intimately.

4 Q What is this?

5 A This is a letter we received from the 09:08:52
6 district attorney late in the month of August 2015.
7 If you will note at the very top of the letter, it
8 was sent to the wrong address, and we never received
9 a copy of it. We didn't receive it until we got a
10 copy of it from Costco. 09:09:05

11 This is when we first realized that we were
12 technically in violation of an archaic California
13 law, where you can't use -- you can't call a plastic
14 biodegradable. It ignored the new generation of
15 plastics called PLAs. 09:09:24

16 Q This is addressed to your father, Jon, but
17 you took charge of responding to it?

18 A I did.

19 Q And the letter was sent on behalf of
20 15 district attorneys' offices? 09:09:36

21 A Correct.

22 Q The letter says that both JBR's 97 percent
23 biodegradable and its no plastic cup claims violate
24 the law?

25 A It does -- no plastic cup claim does not 09:09:48

1 violate the law. It is a true statement. The
2 district attorney who was handling this matter --
3 her name is Alyce Sandbach -- had a personal problem
4 with that statement.

5 Q The letter says, "We have received 09:10:05
6 complaints regarding sales at Costco of Rogers
7 Family Company's OneCup cartridges, which contain
8 plastic, but which have been labeled and marketed
9 with statements such as no plastic cup and 97
10 percent biodegradable." 09:10:21

11 The letter goes on to say, "We believe that
12 Rogers Family Company and Costco are in current
13 violation of the law. California law prohibits
14 false and misleading statements in advertising to
15 consumers, including environmental marketing 09:10:38
16 claims."

17 And they have a citation to the Business
18 and Professions Code.

19 Did you read this letter as raising
20 concerns about both the 97 percent biodegradable and 09:10:48
21 the no plastic cup marketing?

22 A Again, the no plastic cup was a personal --
23 she had a personal problem with it. It is a
24 completely factual and true statement. And we
25 didn't personally have a problem with it. 09:11:01

1 We realized at this time that the
2 biodegradable callout was, was against California
3 law, and we were already in the process of removing
4 it. And if it hadn't been removed already, it was
5 very close to being removed. 09:11:13

6 The no plastic cup, I just took off the
7 package entirely just to appease Ms. Sandbach, even
8 though it was a completely factual and true
9 statement.

10 Q Do you think that in writing this letter, 09:11:26
11 Ms. Sandbach was expressing her personal opinion
12 about the no plastic cup marketing?

13 A Yes.

14 MR. JOHNSON: Objection. That calls for
15 speculation and conjecture as to what she was 09:11:42
16 thinking.

17 BY MS. BRANNON:

18 Q Ms. Sandbach says she's writing on behalf
19 of 15 district attorneys. Isn't that right?

20 A That's correct. 09:11:51

21 Q Did you consult with your environmental
22 attorney when you received this letter?

23 A We did.

24 Q Did you also consult a different attorney
25 in August of 2015? 09:12:06

1 A I believe what happened was, we phased out
2 our original attorney, because we realized that her
3 advice was bad.

4 We retained a gentleman named Trent Norris
5 at Arnold Porter, who also works with Costco, to 09:12:20
6 advise us in this matter.

7 Q And you think that happened around August
8 of 2015?

9 A I wish I could be more precise. I believe
10 it was around there. 09:12:35

11 MS. BRANNON: I'd like to mark Defendant's
12 Exhibit 52 to the Jim Rogers deposition. This is an
13 e-mail from Tom Garber to Alyce Sandbach. It's
14 dated August 28th, 2015. And the Bates label is
15 ROG002103404. 09:12:58

16 (Exhibit 52 was marked.)

17 MR. JOHNSON: 52?

18 MS. BRANNON: Yes.

19 THE WITNESS: Thank you.

20 Okay. 09:14:20

21 BY MS. BRANNON:

22 Q These are e-mails between JBR and
23 Ms. Sandbach?

24 A It appears to be so.

25 Q And she's asking JBR to send her support 09:14:31

1 for the environmental claims on OneCups?

2 A Yes. These are called BPI certifications
3 for compostability.

4 Q Did you have a BPI certification that the
5 entire pod was compostable at this point? 09:14:49

6 A I do not believe so.

7 Q Do you recall what BPI certifications you
8 had at this point?

9 A I believe we had one for the pod ring. We
10 had one for the lid. And we had one for the mother 09:15:03
11 bag and also for the little valve we occasionally
12 use on the mother bag.

13 Q In your e-mail to Ms. Sandbach, toward the
14 bottom of this chain, you said, "Hi, Alyce. Thank
15 you for your time this morning." 09:15:27

16 Did you talk with her by phone?

17 A I did.

18 Q That was on August 19th, 2015?

19 A That's correct.

20 Q What did you say to her? 09:15:35

21 A First of all, I told her that we had not
22 received her letter, because she had a ten-day
23 demand on it.

24 Second of all, I advised her that we --
25 that the components in this bag are -- or in this 09:15:47

1 pod are 97 percent biodegradable/compostable, the
2 only exception being the mesh.

3 And I tried to, I tried to schedule a
4 meeting with her to discuss this matter further.

5 Q What did she say? 09:16:02

6 A I think she was fairly receptive to a
7 meeting. She's -- I can't recall anything else that
8 happened during the, during the, during the
9 conversation.

10 I wanted to know that we had just received 09:16:17
11 the letter and that we were responding as soon as
12 possible.

13 Q Did you tell her you were in the process of
14 removing the biodegradable claims and replacing it
15 with the no plastic cup advertising? 09:16:27

16 A I did.

17 Q Did she have -- I think you said she did
18 not like the no plastic cup advertising?

19 A She personally. I don't even believe her,
20 her partner, Ed Brown, had a problem with it. She 09:16:40
21 was the only one who raised the issue.

22 Q Did she say she had recently seen packages
23 with the illegal biodegradable labeling in Costco?

24 A She may have, but those would have been at
25 the very end of a production run and probably in a 09:16:55

1 slower location, because we had not produced any
2 biodegradable callout product in quite some time.

3 Q What would be the longest Costco would hold
4 OneCups in inventory?

5 A That's almost impossible to say. 09:17:15

6 Q How far out is the best by date?

7 A A year.

8 Q So, presumably, they wouldn't hold them for
9 more than a year?

10 A I don't think so. 09:17:27

11 Q Did JBR recall any of the old packages and
12 replace them with new ones?

13 A We did not. We were not requested to.

14 Q What was Ms. Sandbach's issue with the no
15 plastic cup labeling? 09:17:47

16 A I can't possibly tell you. It was a true
17 and factual statement.

18 Q Did she think that the curved plastic mesh
19 in the pod was a cup?

20 A I have no idea what she thought. I know 09:18:01
21 that she had an issue with the fact that we even
22 called our product a OneCup.

23 She said, "Why do you" -- she asked me why
24 we call it a OneCup. I said, "That's our trademark,
25 and it makes one cup of coffee." It's pretty easy 09:18:14

1 to figure out.

2 Q So your view is that the OneCup does not
3 have a cup on the pod?

4 A It -- you can plainly see that it does not,
5 and it never has. 09:18:24

6 Q Did Ms. Sandbach say that plant based
7 plastics behave the same way as other plastics in a
8 landfill?

9 A Ms. Sandbach said things like that and
10 things like the fact that there are newspapers from 09:18:36
11 the '50s that are in landfills, but that doesn't
12 change the nature of this product.

13 It is compostable. It is as we said it
14 was. And if it's not treated properly, that's not
15 on us. The fact remains that it is a compostable 09:18:47
16 product.

17 And if it's not treated in a manner that
18 allows it to compost, that's not what we are saying.
19 If you shoot it out into space, it's not going to
20 compost either, but it's still a compostable 09:18:59
21 product.

22 Q You testified yesterday that early on, JBR
23 did a lot of Google research on environmental
24 issues.

25 At this point in 2015, with the DAs raising 09:19:11

1 concerns, did you commission scientific research on
2 how OneCups break down when disposed of in ordinary
3 fashion?

4 A We, we had already done -- the BPI, the
5 certification agency, does all that research. They 09:19:30
6 do actual tests of the product degrading over the
7 period of time, which I believe is 90 days.

8 So we rely on them for certification. And
9 we also relied on our manufacturers of the rings and
10 the lid to provide us with that information. 09:19:43

11 Q Was BPI testing how the OneCups would break
12 down in an industrial composting facility?

13 A I do not know how they test it, but they
14 are the most rigorous and most renowned
15 certification agency in the world. 09:20:00

16 Q Was BPI --

17 MR. JOHNSON: Let's take a break for one
18 second.

19 THE WITNESS: Okay.

20 MR. JOHNSON: I think you need to correct 09:20:08
21 something.

22 THE WITNESS: Okay.

23 THE VIDEOGRAPHER: Off the record?

24 Okay. We are off the record. It's 9:20.

25 (Off the record.) 09:20:21

1 THE VIDEOGRAPHER: Okay. We are back on
2 the record. It's 9:21.

3 BY MS. BRANNON:

4 Q Was there something that you wanted to
5 clarify? 09:21:31

6 A There is. I, I don't know what you would
7 call BPI's facility, but it must be an industrial
8 facility. They have pictures of the degradation
9 process over that period of time.

10 So I would, I would guess that yes, it is 09:21:43
11 an industrial facility. And yes, they take
12 time-lapse pictures of the product as they are
13 breaking down in that facility.

14 Q Does BPI do any testing of how a product
15 would break down in a landfill? 09:21:57

16 A I do not know that.

17 Q Did --

18 A I believe that is not their, their scope of
19 their, of their certification process.

20 Q Did JBR do, do or commission any scientific 09:22:06
21 research on how OneCups would break down when
22 disposed of in ordinary fashion in a consumer's
23 trash?

24 MR. JOHNSON: At what, at what point in
25 time? 09:22:26

1 MS. BRANNON: At any point in time.

2 THE WITNESS: I do not recall -- I don't,
3 don't believe so, because that was not the focus of
4 our efforts.

5 MR. JOHNSON: Jim, let's take another 09:22:33
6 break.

7 MS. BRANNON: We are going off the record.

8 THE VIDEOGRAPHER: Okay. We are off the
9 record. It's 9:22.

10 (Off the record.) 09:24:27

11 THE VIDEOGRAPHER: Okay. We are back on
12 the record. It's 9:24.

13 BY MS. BRANNON:

14 Q Mr. Rogers, is there something you'd like
15 to clarify, based on your discussion with 09:24:42
16 Mr. Johnson?

17 A I am not aware of any research we did of
18 how our, our product behaves in a landfill, per se.
19 There might be some research.

20 I know that my brother Pete has been 09:24:55
21 working with our local landfill, but I'm not aware
22 of, of that research.

23 And the focus of our efforts was on making
24 something compostable.

25 Q Did JBR conduct or commission any research 09:25:11

1 Q You've been working in the coffee industry
2 for about 30 years?

3 A Hmm-hmm.

4 MS. BRANNON: I'd like to mark Defendant's
5 Exhibit 53 to the Jim Rogers deposition. This is an 09:30:35
6 e-mail from you to Clenden Bramhill. It's dated
7 August 26, 2015. And the Bates label is
8 ROG001437505.

9 (Exhibit 53 was marked.)

10 THE WITNESS: Thank you. 09:31:04

11 BY MS. BRANNON:

12 Q You can read the whole thing if you'd like,
13 but I'm going to focus on the e-mail from you on
14 the --

15 A I'd like to read -- 09:31:50

16 Q -- third page.

17 A I'd like to read the whole thing, please.

18 Q Okay.

19 A Okay.

20 Q So in this e-mail thread, it looks like 09:32:52
21 Costco is asking JBR to supply a new product, the
22 Rainforest Organic. Is that right?

23 A That's correct.

24 Q And you write to Ms. Ornelas and others and
25 say, "Hold off. We cannot ship boxes to Costco with 09:33:07

1 the 97 percent bio callout. Chris will have to
2 order no plastic cup boxes."

3 Is that right?

4 A That's correct.

5 Q So when you sent these e-mails in August of 09:33:18
6 2015, was JBR still sending boxes to some retailers
7 with biodegradable claims?

8 A I don't believe so. I believe at some
9 point during this time frame, we destroyed those
10 boxes. 09:33:37

11 Q And you were actively trying to get the no
12 plastic cup advertising for Costco?

13 A I was actively trying to not have the
14 biodegradable callout for Costco. The no plastic
15 cup was our replacement term. We were still using 09:33:51
16 that term, I believe, at that point in time.

17 Q And your e-mail says, "This is of critical
18 importance. All Costco product must have the no
19 plastic cup callout on it."

20 Is that correct? 09:34:10

21 A As opposed to the bio, yes? We were --
22 like I said just a minute ago, we were currently
23 using the no plastic cup callout on our boxes.

24 We were phasing out the biodegradable. I
25 wanted to make sure none of the biodegradable 09:34:21

1 material ended up at Costco especially.

2 Q And this is after your conversation with
3 Ms. Sandbach and after you received the August 11,
4 2015 letter from 15 district attorneys, saying that
5 the no plastic cup advertising was illegal? 09:34:38

6 A Yes. The no plastic cup advertising was
7 not illegal.

8 Q And you don't recall whether JBR destroyed
9 any of its old biodegradable packaging at this time?

10 A We can find out when, but we ended up 09:35:00
11 destroying several hundred thousand dollars worth of
12 raw materials.

13 Q Who would know when precisely that
14 happened?

15 A I don't know who would have, who would 09:35:11
16 have -- I believe I have that information somewhere.

17 Q If that information is not in your files,
18 would Mr. Miller be the best person to ask about it?

19 A No. He's no longer with us.

20 Q Would Ms. Cuthbert be the right person to 09:35:35
21 ask about it?

22 A I don't know if she was involved. What we
23 did was, we destroyed the boxes and sent them to a
24 recycler, cardboard recycler.

25 Q Would you have created documentation at the 09:35:47

1 time that you did that?

2 A Absolutely.

3 Q Where would you have kept that
4 documentation?

5 A Like I said, I believe I have it on my 09:36:00
6 computer.

7 Q Would it be in your e-mail?

8 A Not in my e-mails.

9 Q Would it be a Word document or an Excel
10 document? 09:36:11

11 A Probably an Excel document.

12 MS. BRANNON: I'd like -- you can set that
13 one aside.

14 I'd like to mark Defendant's Exhibit 54 to
15 the Jim Rogers deposition. This is an e-mail from 09:36:26
16 you to rfc_all, and it's dated April 28th, 2016.
17 The Bates label on this one is ROG001452080.

18 (Exhibit 54 was marked.)

19 THE WITNESS: Thank you.

20 Okay. 09:37:40

21 BY MS. BRANNON:

22 Q Do you recognize this e-mail?

23 A Of course.

24 Q Is this an e-mail that you drafted and
25 sent? 09:37:45

1 A As you can see, it is.

2 Q And I believe you testified yesterday that
3 e-mails sent to rfc_all@rogersfamilyco.com go to the
4 entire company?

5 A That's correct. 09:37:58

6 Q So this e-mail was explaining company
7 policies to the entire company. Right?

8 A It was describing what to say to outside
9 inquiries about the product. There was some --
10 there was still a bit of confusion about that. 09:38:10

11 And because of the scrutiny that the
12 district attorney had placed us under, I wanted to
13 make sure that we did not misstep, because she was
14 looking at our website on a very -- on a, on a
15 continual basis, and she was, she was scrutinizing 09:38:25
16 us far above and beyond what I thought was
17 necessary.

18 You know, I, I just -- I still don't
19 understand why we were the guys -- the bad guys in
20 her, in her book, but that's her, her thing. 09:38:40

21 Q And there was still confusion within the
22 company, which is why you sent this?

23 A Well, there are 250 employees. So I wanted
24 to make sure every single one understood what we
25 were trying to say and what we were trying to do. 09:38:54

1 Q You said you didn't understand why the DAs
2 were so focused on JBR.

3 Did Ms. Sandbach ever use the term
4 greenwashing with you?

5 A Yes, she did. 09:39:10

6 Q What does that term mean to you?

7 A It means that you are making false claims
8 about your product to try and appeal to people who
9 are environmentally conscious. And I actually
10 personally was insulted by that. 09:39:19

11 Q In your e-mail to the company, you write,
12 "OneCups are not biodegradable."

13 You also write, "Make no claims about it
14 being okay to put our OneCups in a landfill, another
15 big issue for them." 09:39:39

16 Does them refer to the district attorneys?

17 A It does.

18 Q And the district attorneys told you that
19 OneCups do not biodegrade in a landfill?

20 A They did not. They, they have a problem 09:39:51
21 with anything you put in a landfill. Their claim is
22 that nothing you put in a landfill will ever
23 biodegrade. That is their claim.

24 Q You also write, "Do not say that we do not
25 use plastic. Our materials are technically 09:40:06

1 plastic."

2 Which parts of the OneCup are plastic
3 today?

4 A Okay. If you want to get very technical,
5 plastic is defined as any, any material that you can 09:40:21
6 mold by applying heat to it.

7 Even if you have these brand-new plastics,
8 which are plant based and which degrade and compost,
9 they are still technically, in California, called
10 plastic. 09:40:35

11 So that is, that is the reason for my
12 statement there.

13 Q And which parts of the OneCup are currently
14 plastic by the definition?

15 A All, all, all of our -- every component of 09:40:44
16 our OneCup is a PLA based plastic, which is
17 compostable.

18 Q So that includes the ring and the lid and
19 the mesh?

20 A Correct. 09:40:55

21 Q Are there any other parts of the OneCup?

22 A There is the mother bag that the pods go
23 into. That is also compostable.

24 Q And that's also plastic?

25 A It is a PLA based compostable plastic. 09:41:05

1 MS. BRANNON: Okay. You can set that
2 document aside.

3 I'd like to mark Defendant's Exhibit 55.
4 This is an e-mail from you to Chris Miller. It's
5 dated April 29, 2016. And the Bates label is 09:41:20
6 ROG001912238.

7 (Exhibit 55 was marked.)

8 THE WITNESS: Yes.

9 BY MS. BRANNON:

10 Q Is this an e-mail following up on how to 09:41:49
11 describe OneCups?

12 A No.

13 Q What is this e-mail?

14 A This is an e-mail regarding our website.
15 And our NAV, what it refers to, is our, our ERP 09:42:02
16 system, enterprise resource planning, forecasting,
17 manufacturing, etc.

18 Some of the products in our Navision system
19 still had the word bio in them, and I purged those
20 from the Navision system to reduce confusion. 09:42:19

21 Q And were there also uses of the term
22 biodegradable on your consumer facing website at
23 this time?

24 A Are you familiar with cached website pages?

25 Q Yes. 09:42:35

1 A Okay. Some Google cache pages had that
2 reference, and I was trying to -- this does not
3 refer to that, but at the same time, I was trying to
4 remove those from the caches.

5 Q Were any of JBR's products advertised as 09:42:44
6 biodegradable after April of 2016?

7 A No.

8 MS. BRANNON: Okay. You can set that
9 document aside.

10 I'd like to mark an e-mail from you to Lee 09:43:07
11 Geary, dated June 15th, 2016. The Bates label is
12 ROG001616055. And this is Defendant's Exhibit 56 to
13 the Jim Rogers deposition.

14 (Exhibit 56 was marked.)

15 THE WITNESS: Okay. 09:44:23

16 BY MS. BRANNON:

17 Q It looks like in this e-mail thread that
18 Mr. Geary is trying to change the images of the
19 OneCup packaging on Amazon.com to remove images that
20 use the word biodegradable. Is that correct? 09:44:40

21 A That is my understanding.

22 Q And you tell Mr. Geary, "Please tell Amazon
23 that any reference to biodegradable on the packaging
24 is illegal and that a coalition of county district
25 attorneys will come after them for it. The result 09:44:54

1 will be heavy fines."

2 Is that right?

3 A That's right.

4 Q Why was he having trouble getting Amazon to
5 change the images? 09:45:07

6 A Obviously, you've never worked with Amazon.
7 It is almost impossible to get anything done there.

8 First of all, it is almost impossible to
9 have real people involved. Everything is
10 computerized. Everything is automated. 09:45:18

11 It's very, very difficult to work with
12 them. And we were trying to get those packages
13 removed, because they were obsolete.

14 Q And --

15 A You could probably still find biodegradable 09:45:29
16 pictures somewhere on the web if you looked hard
17 enough. It's almost -- it's really difficult.

18 And we were trying to be clean and trying
19 to be honest and trying to make things, you know --
20 how do I put this? 09:45:42

21 We were trying to represent our products
22 accurately.

23 Q And Amazon's reason for pushing back and
24 refusing to change the images was that the images
25 they were using on their website matched the stock 09:45:56

1 they had. Is that right?

2 A I don't believe --

3 MR. JOHNSON: Objection, calls for
4 speculation and conjecture as to what Amazon was or
5 wasn't going to do. 09:46:05

6 THE WITNESS: I, I can't answer for Amazon,
7 but I can, I can tell you that we hadn't shipped by
8 then, by June of 2016. We hadn't shipped anything
9 biodegradable to Amazon in six months maybe.

10 So there's no way, in my opinion, that they 09:46:22
11 would be carrying 6,000 items that had the
12 biodegradable callout on it.

13 BY MS. BRANNON:

14 Q Could you remind me who Jim Schuett is?

15 A He's our art and web director, or he was at 09:46:34
16 the time.

17 Q And he is reporting on a conversation that
18 he had with someone at Amazon?

19 A Chemico is a -- we discussed fulfill by
20 Amazon third party last year. 09:46:51

21 Chemico is a party that buys -- when --
22 basically, when we put something on sale, they buy a
23 pallet of it and sell it on Amazon. They are a
24 third-party vendor.

25 Q So your third-party vendor reported that 09:47:04

1 Amazon was pushing back on them, saying that the
2 images matches -- that the image matches the stock?

3 A The image matches the fact that it is a 80
4 count box of that particular item. It's very
5 difficult to work with them on that.

09:47:26

6 And that's the reason for my, my last
7 e-mail, saying, "If you, if you keep, you know,
8 screwing around, you might have the district
9 attorney after you."

10 Q Did this get their attention?

09:47:34

11 A I believe so, yes.

12 Q You think they changed the images after
13 this?

14 A If memory serves.

15 Q Were any of JBR's OneCups advertised as
16 biodegradable after June of 2016?

09:47:46

17 A Nope. Never.

18 Q Did JBR's brand partner, Oakland Coffee,
19 raise concerns about JBR's environmental
20 advertising?

09:48:06

21 A No.

22 MS. BRANNON: I'd like to mark another
23 document. This is an e-mail from Kate Kaplan at
24 Oakland Coffee to you. It's dated November 8th,
25 2016. The Bates label is ROG001913868.

09:48:18

1 This is Defendant's Exhibit 57.

2 (Exhibit 57 was marked.)

3 THE WITNESS: Thank you.

4 Okay.

5 BY MS. BRANNON:

09:49:13

6 Q Who is Kate Kaplan?

7 A Kate Kaplan is the director of Oakland
8 Coffee Works.

9 Q Who is Michael Pearce?

10 A Michael Pearce is one of their partners.

09:49:20

11 Q And who is the Mike referred to in the
12 first sentence of the e-mail?

13 A You know him as Mike Dirnt. He's the basis
14 for the band Green Day.

15 Q Ms. Kaplan writes that she, Michael, and
16 Mike, quote, are very concerned that the
17 environmental claims being used on the packaging
18 could be misleading.

09:49:31

19 Which claims was she concerned about?

20 A I don't recall.

09:49:45

21 Q She writes, "Mike and Michael are both
22 really concerned about the claims that we make on
23 the pod packaging. The disclaimer language that we
24 got from your lawyer starts with certified
25 compostable at an industrial composting facility."

09:50:06

1 She appears to be concerned that this could
2 be confusing or misleading to consumers.

3 Do you recall discussing this with her?

4 A I do not.

5 Q Is the reference to your lawyer here a 09:50:26
6 reference to Tsan Abrahamson?

7 A No.

8 Q Is it a reference to Trent Norris?

9 A It is.

10 Q Would Mr. Garber have also been involved in 09:50:40
11 a discussion with Oakland about the environmental
12 advertising being used on Oakland's packaging?

13 A Probably. I'm trying to recall. I
14 believe, at this point, it was a fully compostable
15 pod. I don't recall exactly when that switch was 09:51:09
16 made, but believe me. If Mr. Morris had any problem
17 with the, with the, with the verbiage, he would have
18 said so. He's a very cautious man.

19 I will say also that Oakland Coffee Works
20 is extremely particular about how their package 09:51:34
21 looks.

22 Q Oakland wants to be very careful about its
23 environmental claims?

24 A Not only that, but just how the whole thing
25 looks. And they don't like certain fonts and things 09:51:46

1 like that. So I don't recall what this was about.

2 MR. JOHNSON: Okay.

3 MS. BRANNON: Okay. You can set that
4 aside.

5 THE WITNESS: Okay. 09:51:58

6 MS. BRANNON: I'd like to mark an e-mail
7 from Chris Miller to you. It's dated July 21st,
8 2016. The Bates label is ROG001466053.

9 And this is Defendant's Exhibit 58.

10 (Exhibit 58 was marked.) 09:52:19

11 THE WITNESS: Thank you.

12 Okay.

13 BY MS. BRANNON:

14 Q Was BPI testing the OneCups for
15 certification as 100 percent industrially 09:53:44
16 compostable in or around July 2016?

17 A Are you referring to the components or the
18 finished product?

19 Q I'm referring to the finished product of
20 the OneCup. 09:53:58

21 A I do not recall.

22 Q What do you recall this certification
23 process being about?

24 A If memory serves, our components had
25 passed, but the finished product was still in 09:54:08

1 testing, but I do -- I cannot guarantee that that is
2 accurate.

3 Q So you think this is about testing of the
4 full OneCup product as industrially compostable?

5 A That's what I, that's what I believe it to 09:54:25
6 be, but I don't recall.

7 Q Mr. Miller writes that certification
8 testing begins Monday, July 26th of 2016, with a 10
9 to 12-week lead time.

10 He says, "This is for Asahi product only." 09:54:49
11 Then he says, "We will need to submit again for our
12 pod with UrthPact material, 12- to 15-week lead
13 time."

14 A Where are you seeing this?

15 Q This is on the second page under PBI cert. 09:55:02
16 It's points 2 and 3.

17 A Okay.

18 Q So JBR was still several months away from
19 having certification as 100 percent compostable at
20 the time of this e-mail? 09:55:31

21 A I don't recall. I'm not involved in the
22 testing process at all.

23 Q Well, Mr. Miller says that the testing is
24 beginning on July 26th, and he says it has a 10 to
25 12-week lead time. 09:55:42

1 And he also says there is a need to submit
2 the pod with UrthPact material, and he says that
3 will involve a 12 to 15-week lead time.

4 A Okay.

5 Q So do you take from this that JBR is still 09:55:52
6 several months away from having certification as
7 compostable?

8 A Again, I don't recall, because we are
9 testing products by different manufacturers as
10 components in the pod. So that might be what this 09:56:04
11 is in reference to.

12 Q In your e-mail back to Chris, you say, "By
13 law, you have 90 days to produce certification once
14 someone requests it. If we are 100 percent good,
15 what do you think about going live 60 to 90 days 09:56:29
16 before we get the certs?"

17 And Chris writes back and says, "I am
18 comfortable with that approach."

19 Do you recall this?

20 A I do. 09:56:44

21 Q Were you suggesting that JBR start
22 advertising that OneCups were compostable 60 to
23 90 days before receiving third-party certification?

24 A I was not.

25 Q What were you suggesting? 09:56:56

1 A I was asking a question.

2 Q What was your question?

3 A The question -- I will read it back to you.

4 "By law, you have 90 days for product

5 certification. If we are 100 percent good, what do 09:57:06

6 you think about going live before we get the certs?"

7 That's a question.

8 Q And Mr. Miller said he was comfortable with

9 that?

10 A Mr. Miller is a purchasing agent. He is 09:57:17

11 not involved in product testing or in sales or in

12 administration.

13 Q Do you know if JBR actually started

14 marketing OneCups as 100 percent compostable before

15 receiving BPI certification? 09:57:28

16 A Not to my knowledge.

17 Q Who would know for sure?

18 A You can ask everybody else. I don't know,

19 but not to my knowledge.

20 Q Who ran point on dealing with BPI about the 09:57:37

21 certification?

22 A Chris did at the time. It was beyond

23 his -- how do we put this?

24 My brother Pete, I believe, took it over,

25 because it was just dragging. And he -- that's not 09:57:54

1 his, his area of expertise. He's basically a
2 purchasing agent.

3 Q So Pete would likely know --

4 A Yes.

5 Q You can set this aside. 09:58:08

6 A Okay.

7 Q Do you recall that JBR settled a case in
8 March of 2018 with several district attorneys in
9 California?

10 A Yes. 09:58:19

11 Q Were you involved in the settlement
12 discussions?

13 A I was.

14 Q Who initially proposed the settlement?

15 A I believe the district attorney did. 09:58:29

16 Q How was Costco involved in those
17 discussions?

18 A Costco was held harmless. They were not
19 involved in the discussions.

20 Q Does that mean that JBR paid the full 09:58:39
21 \$500,000 fine itself?

22 A It does.

23 MR. JOHNSON: Object to the use of the word
24 fine.

25 // 09:58:48

1 BY MS. BRANNON:

2 Q Was Oakland Coffee Works involved in the
3 settlement?

4 A No.

5 Q So Oakland Coffee didn't pay any portion of 09:58:53
6 the \$500,000?

7 A No.

8 Q You said a number of times that you believe
9 JBR received bad advice from its environmental
10 lawyer. And you mentioned yesterday that you filed 09:59:07
11 a malpractice suit against her.

12 What court did you file that in?

13 A I wouldn't know what court it was.

14 Q Was it here in Sacramento?

15 A I don't know what court it was. 09:59:25

16 Q Does Mr. Johnson represent you in that
17 case?

18 A He does.

19 Q Did you specify the amount of damages that
20 you are seeking? 09:59:31

21 A We have discussed the amount of damages
22 that we are seeking.

23 Q Did you specify it in your complaint?

24 A We delineated how we were damaged and to
25 what amount. 09:59:42

1 Q Is that case still pending?

2 A It is.

3 MS. BRANNON: I'd like to mark another
4 exhibit. This is an e-mail from Chris Miller to
5 you. It's dated June 27th, 2016. The Bates label 09:59:59
6 is ROG002227287.

7 And this is Defendant's Exhibit 59.

8 (Exhibit 59 was marked.)

9 THE WITNESS: Thank you.

10 Okay. 10:00:45

11 BY MS. BRANNON:

12 Q Is this an e-mail you sent?

13 A Yes, it is.

14 Q The who receives e-mails sent to rfc_supes?

15 A The supervisors in our company, managers 10:00:52
16 and higher.

17 Q And you write that the advice that you
18 received from the attorney, quote, was no good. And
19 you say that you are trying to assess the total
20 damages to the company. 10:01:05

21 Is this the quantification that you were
22 just mentioning?

23 A That's part of the quantification, just the
24 loss in material costs. The fact that the advice
25 was no good is obvious. She, she told us to say 10:01:14

1 something that was against the law. I mean, it's,
2 it's not a belief. It's a fact.

3 Q It's a fact that she gave you bad advice.
4 And as a result, JBR used illegal advertising?

5 A Yes. In California. 10:01:28

6 Q Did you receive responses to this e-mail
7 from all supervisors?

8 A The supervisors involved, yes.

9 Q What did you do with those responses?

10 A I, I collated and combined reports of 10:01:48
11 expenses, based on labor, based on design, based on
12 destruction to product, and other things and put
13 them together in a document.

14 Q Do you know if that document has been
15 produced in this litigation? 10:02:05

16 A I, I do not believe so.

17 Q Are you aware of JBR's environmental claims
18 being investigated by any governmental entities,
19 other than district attorneys in California?

20 A I am not aware. 10:02:18

21 Q Who at JBR would be aware if there were any
22 other investigations pending?

23 A I would assume it would be me.

24 MS. BRANNON: Okay. I'd like to mark
25 another exhibit. This is the transcript of your 10:02:41

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California do hereby
3 certify:

4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth;
6 that any witnesses in the foregoing proceedings,
7 prior to testifying, were duly sworn; that a
8 verbatim record of the proceedings was made by me
9 using stenographic machine shorthand which was
10 thereafter transcribed under my direction; that the
11 foregoing transcript is an accurate transcription
12 thereof.

13 I further certify I am neither financially
14 interested in the action nor a relative or employee
15 of any attorney or any of the parties.

16 IN WITNESS WHEREOF, I have this date
17 subscribed my name.

18
19 Dated: February 26, 2019
20
21
22

23 <%signature%>

LISA RICHARDSON, RPR, CRR, RMR

24 CSR No. 5883
25